Supreme Court of Ohio Clerk of Court - Filed November 01, 2017 - Case No. 2016-1891

IN THE SUPREME COURT OF OHIO
Supreme Court Case Number 16-1891

STATE OF OHIO

Appellee

v.

ALEXIS MARTIN

Appellant

On Appeal from the Summit County Court of Appeals Ninth Appellate District Court of Appeals No. 27789

MERIT BRIEF OF APPELLEE THE STATE OF OHIO

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. The Murder of Angelo Kerney and Shooting of Alecio Samuel

On November 7, 2013, a group of four individuals executed a plot to rob Angelo Kerney at his house on Edward Avenue in Akron, Ohio. During that robbery, Kerney was shot twice in his head and died at the scene. (R. 23, June 16, 2014 Amenability Hearing Tr. (hereinafter, "Amen. Tr."), p. 86, 108.) Alecio Samuel, another occupant of the house, was also present during the robbery and he was shot once in his head. (R. 21, Nov. 8, 2013 Preliminary Hearing Tr. (hereinafter "Prelim. Tr."), p. 5; R. 10, Pre-Sentence Report (hereinafter, "PSR"), p. 2-3, 6-7.) Although Samuel survived the attack, he suffered debilitating injuries that will have lifelong effects on him. (Amen. Tr., p. 119-121.) Despite his injuries, Samuel could see the four individuals cleaning up the scene before fleeing. (Prelim. Tr., p. 5; PSR, p. 2-3, 6-7.)

Police were called to the scene soon after the shootings occurred. They learned from individuals who were present at the house shortly before the shootings that two females, including Defendant-Appellant Alexis Martin a/k/a Alexis Love ("Appellant"), asked everyone to leave the house except for Kerney and Samuel. (Amen. Tr., p. 78.) This information led police to interview Appellant, who provided a statement indicating that she plotted with a female, Janae Jones, and two males, Dashaun Spear and Travaski Jackson, to rob Kerney that evening. (Prelim. Tr., p. 5; PSR, p. 5-7.)[1] At the time of the plot's initiation, Spear and Jackson were friends; Appellant and Spear were linked as former romantic partners, and Jackson and Jones were linked as sexual partners. (*Id.* at p. 6, 11.)

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[1] Jackson and Jones also gave inculpatory statements to police that were generally consistent with the statement given by Appellant. (PSR, p. 3-6.)

Of all these individuals, Appellant was the only person who had any connection to the victims. (Amen. Tr., p. 80.) Appellant knew Kerney because he was running an escort service, and Appellant "recruit[ed] girls" for the escort service. (PSR, p. 3.) Based on this association, police concluded during their investigation that Appellant was the person who "set [the plot] up." (Amen. Tr., p. 83.)

Appellant and her accomplices considered three different options to accomplish the robbery and ultimately decided to have Appellant and Jones go into Kerney's residence. (PSR, p. 4-5.) Once inside, they would distract Kerney with sexual activity and dancing to "set [Kerney] up." (Prelim. Tr., p. 5, 7.) With Kerney distracted, Spear and Jackson would then go into the residence and commit the robbery. (Prelim. Tr., p. 5; PSR, p. 4-5).

Appellant and Jones entered Kerney's residence and they unlocked the door to allow Jackson and Spear to come into the house once Kerney and Samuel were distracted. (Prelim. Tr., p. 5.) As part of their distraction of Kerney and Samuel with sexual activity, Jones went to an upstairs bedroom with Kerney while Appellant stayed on the first floor with Samuel. (Amen. Tr., p. 86; PSR, p. 3, 6.) Shortly thereafter, Spear and Jackson came in through the unlocked door. (PSR, p. 2.) Spear went upstairs and shot Kerney in his head. (Amen. Tr., p. 86.) After that shooting, Jones ran downstairs where she heard Appellant say that their male accomplices "were about to 'do old dude[.]'" (PSR, p. 6.) After that statement, Samuel begged for his life, but he was shot in the head.[2] (Prelim. Tr., p. 5; PSR, p. 2-3, 6-7.)

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[2] The record has conflicting information as to the identity of the person who shot Samuel. Regardless, it is undisputed that Appellant did not shoot either of the victims in this matter.

Appellant, Jones, Jackson, and Spear all faced criminal charges stemming from their involvement in the murder of Kerney and attempted murder of Samuel. Jones, Jackson, and Spear all pleaded guilty to a variety of offenses relating to the incident. All three individuals received life sentences. (PSR, p. 7.)

II. Juvenile Court Proceedings

As to Appellant, the State filed a Complaint in the Summit County Juvenile Court (the "Juvenile Court") charging her as a delinquent child on counts of aggravated murder, attempted murder, aggravated robbery, aggravated burglary, felonious assault, and tampering with evidence. The State subsequently filed a motion for the Juvenile Court to relinquish jurisdiction and to transfer the matter to the General Division of the Summit County Court of Common Pleas (the "General Division"). Appellant waived a probable cause hearing and the case proceeded to an amenability hearing. (R. 22, Feb. 13, 2014 Probable Cause Tr., p. 3, 11, 13.)

The amenability hearing went forward on June 16, 2014, when Appellant was 16 years old. At that hearing, neither Appellant nor Appellant's attorney objected to the Juvenile Court's authority to conduct the hearing or to transfer the matter to the General Division. Neither Appellant nor Appellant's attorney requested the appointment of a guardian ad litem for Appellant. And, neither Appellant nor Appellant's attorney invoked, or even mentioned, the purported applicability of R.C. 2152.021(F).

Dr. Thomas Webb, the Juvenile Court's psychologist, testified at the hearing regarding the Amenability Evaluation of Appellant that he performed. The Amenability Evaluation was also admitted into evidence at the hearing. (Amen. Tr., p. 42.) The Amenability Evaluation reveals that Appellant has had a long history of behavior nonconformity, deception, and bullying. (R. 10, Amenability Evaluation (hereinafter,

"Amen. Rpt."), p. 4.) The Evaluation further indicates that by her pre-teen years, Appellant had already engaged in activities and taken on roles associated with adults:

> By the preteens, [Appellant] was already involved with persons much older than herself, including a romantic attachment to a twenty-one year old followed by sexual involvement that produced a pregnancy with a sixteen year old. * * * By her mid-teens, [Appellant] appears to have taken on roles more akin to that of an adult, allegedly managing an escort service and dancing as a stripper. Certainly by fifteen, her life style had become out of control.

(*Id.* at p. 6.) In addition to these "adult sexual enterprises," Appellant was a habitual, daily user of alcohol, marijuana, and "Molly," a synthetic psychoactive drug. (*Id.* at p. 7-8.) On top of these adult sexual and drug activities, Appellant gave responses to the *Survey Profiling Psychodevelopmental Information* (hereinafter, "Psychodevelopmental Survey"), which is "a standardized measure of social and personal attitudes," that "differed from female adolescents in the general population in a number of ways." (*Id.* at p. 8.)

After reviewing the failure of extensive efforts to rehabilitate Appellant through Juvenile Court programming as well as other services, Dr. Webb stated his opinion as follows regarding Appellant's amenability:

> It is my opinion that [Appellant's] emotional maturity is undermined by a psychopathology which has been both longstanding and resilient to change despite psychological and psychotropic interventions. While she has sought to achieve an adult-like independence and life style, her impulsive, emotionally driven decision-making reflects marked immaturity – especially where inhibited judgment may be exasperated by a pervasive drug use that does not yet appear fully addressed. On the other hand, with respective to cognitive and physical maturity, these in themselves would not be factors precluding transfer.

(*Id.* at p. 13.)

In testifying about his conclusions, Dr. Webb discussed the great lengths at which the Juvenile Court and other programs attempted to rehabilitate and treat Appellant.

Specifically, Dr. Webb testified about the Crossroads Program, which he identified as a "very intensive probation." (Amen. Tr., p. 23.) He also explained in greater detail that Appellant's responses to the Psychodevelopmental Survey showed that Appellant "tried to manipulate events to align with her particular goals." (*Id.* at p. 24.) Based on his investigation into the previous rehabilitative efforts for Appellant, her history, and her psychological profile, Dr. Webb finally testified as follows regarding the ability of further Juvenile Court services to rehabilitate Appellant:

> Q: * * * What would we do from here?
>
> A: Here's the difference [compared to previous rehabilitative efforts] I think now is her age. In previous years she was a – there was a time of childhood when she should have been dependent upon adults but could not be.
>
> At this point I think she has been acting in the adult world and has had adult opportunities both for good and for bad and has now an adult mentality which places I think a different angle on her ability to profit from experience.
>
> And one of them would be we never put her into really an intensive drug program and that, like I said from the beginning, from the time she was a preteen she was selling marijuana and certainly using it herself and we just never got to that level of intensity. That's one of them.
>
> And I think she learns from experience unlike – well, I think the fact that she has high abstract reasoning I think that gives us some hope that she'll put it together and take advantage of the experiences that we offer albeit in a structured setting, ***mainly prison***.
>
> Q: Well * * * the best indicator of future behavior is what?
>
> A: The past.

(Emphasis added.) (*Id.* at p. 30-31.)

After the close of evidence, Appellant argued against the transfer of jurisdiction to the General Division by relying on the amenability factors outlined in R.C. 2152.12(D) and (E). During Appellant's and the State's arguments on this issue, the Juvenile Court sua sponte raised the issue of Appellant's status as a potential victim of human

trafficking, which the court identified as "a major factor" to be considered. (*Id.* at 170.) The court's concern related to Dr. Webb's statement in the Amenability Evaluation that Appellant was possibly "being 'sex trafficked' herself." (Amen. Rpt., p. 12.) Although the Juvenile Court clearly opened the door to the possibility of Appellant invoking the purported protections of R.C. 2152.021(F), Appellant refused to walk through it. Instead, Appellant simply argued that the information before the Juvenile Court on the issue of sex trafficking was "highly suspicious." (Amen. Tr., p. 173.)

On July 1, 2014, the Juvenile Court issued an order relinquishing jurisdiction and transferring the matter to the General Division. (Hereinafter, the "Bindover Order"). In doing so, the Juvenile Court did exactly what Appellant asked of it: the Juvenile Court considered the amenability factors under R.C. 2152.12(D) and (E). In considering those factors, the Juvenile Court concluded that a transfer to the General Division was appropriate for the following reasons:

1. One of the victims died as a result of his injuries. A second victim survived a gunshot wound to the head but is greatly impaired as a result of his injury.
2. [Appellant] had developed a close relationship with the deceased victim and used that relationship to allow herself and her co-offenders to gain access to him.
3. [Appellant] was on intensive probation through Crossroads at the time of the offense charged.
4. [Appellant] committed this act while on probation. While this is her first felony, her previous misdemeanor charges were both offenses of violence. While she was never adjudicated, [Appellant] has an extensive history of drug use and trafficking.
5. [Appellant] is cognitively and physically mature enough for transfer.
6. The Court does not believe that [Appellant] can be adequately rehabilitated within the Juvenile Justice system. Due to the fact that [Appellant] is alleged to have planned the alleged offenses and given the serious nature of the offenses, the Court finds that public safety requires that [Appellant] be subject to adult sanctions.

(R. 17, Bindover Order, p. 1-2.)

III. General Division Proceedings

After the transfer of this matter to the General Division, Appellant sought a second bite at the apple in Juvenile Court. Consequently, Appellant filed a motion asking that the General Division vacate the Juvenile Court's Bindover Order and transfer the matter back to the Juvenile Court. The basis for Appellant's motion was that the General Division purportedly lacked jurisdiction because the Juvenile Court failed to follow the procedures outlined in R.C. 2152.021(F). In a well-reasoned and extensive analysis, the General Division denied Appellant's motion. (R. 17, Nov. 26, 2014 Gen. Div. Journal Entry, p. 8.) As a threshold matter, the General Division concluded that it lacked authority to vacate and/or reverse the bindover order of the Juvenile Court. The General Division also addressed the substance of Appellant's position and concluded that Appellant's position was meritless because Appellant failed to raise the issue of R.C. 2152.021(F)'s purported applicability in Juvenile Court and failed to establish that the diversion program provided for by R.C. 2152.021(F) was mandatory. (*Id.* at p. 5-7.)

Appellant then entered into plea negotiations. The parties thereafter agreed that if Appellant pleaded guilty to murder with a firearm specification and felonious assault, then the remaining seven charges would be dismissed, the sentences for murder and felonious assault would be consecutive, and the parties would be free to argue the length of the felonious assault sentence. (R. 15, Feb. 17, 2015 Change of Plea Tr., p. 2-3.) Although Appellant renewed the prior motion to vacate the Bindover Order with the intention of bringing the matter up on appeal, she nevertheless pleaded guilty to the charges specified above. (*Id.* at 4, 20.)

The matter then proceeded to sentencing. As part of sentencing, Dr. Luna Jones, a board-certified forensic psychologist with the Psycho-Diagnostic Clinic, prepared a

Mitigation of Penalty Report that relied on her review of Appellant's history and the underlying facts of this matter. Based on that review, Dr. Jones concluded that

> Appellant displays a repetitive and persistent pattern of behavior in which the basic rights of others are violated. She has a history of bullying others and engaging in physical altercations with others. She has carried a gun, taken things from others, and has been physically cruel to animals. [Appellant] has often lied to obtain goods and manipulates others. * * * Finally, [Appellant] lacks empathy for others and remorse for her behavior.

(R. 10, Mitigation of Penalty Report, p. 14.) Dr. Jones's opinion regarding Appellant further highlighted "the ease with which she manipulates others," including the fact that she "when it suits her purposes, [Appellant] may exaggerate her problems and/or react drastically to them[.]" (*Id.* at p. 15.) Indeed, the extent of Appellant's manipulation led Dr. Jones to warn those who treat her: "[Appellant's] treatment providers should be aware of her tendency to manipulate others[.]" (*Id.* at 16.) After considering the record, including the Mitigation of Penalty Report, the General Division imposed a total prison term of 21 years to life.

IV. Appellate Proceedings

Appellant appealed her convictions to the Ninth District Court of Appeals, raising two assignments of error. In her first assignment of error, Appellant argued that the Juvenile Court erred by transferring the matter to the General Division without following the procedures contained in R.C. 2152.021(F). Appellant similarly contended in her second assignment of error that her convictions were void ab initio due to the General Division's purported lack of subject-matter jurisdiction.

The Ninth District overruled both assignments of error and affirmed Appellant's convictions. *State v. Martin*, 9th Dist. Summit No. 27789, 2016-Ohio-7764, ¶ 14. In doing so, the Ninth District concluded that Appellant's guilty plea resulted in a waiver of

any purported error in the Juvenile Court's bindover procedure. *Id.* at ¶ 13. The Ninth District further rejected Appellant's contentions because she failed to argue that the General Division lacked jurisdiction because the Juvenile Court failed to comply with the bindover provisions contained in R.C. 2152.12. *Id.* at ¶ 11.

Appellant subsequently filed a jurisdictional appeal with this Court, presenting two propositions of law for this Court's consideration. This Court subsequently accepted jurisdiction by a four-to-three vote. *7/05/2015 Case Announcements*, 2017-Ohio-5699.

LAW AND ARGUMENT

I. Appellant's Proposition of Law I: Once a Court Determines that a Juvenile Defendant Is a Human Trafficking Victim, the Court Must Appoint a Guardian Ad Litem, Consider the Child's Trafficking Status, and Determine Whether the Complaint Filed in Delinquency Is Related to the Child's Victimization prior to Conducting Certification and Bindover Proceedings.

In support of Appellant's first proposition of law, Appellant and her amici argue that the Juvenile Court erred because it failed to consider placing Appellant, an individual accused of murder and attempted murder, in a diversion program pursuant to R.C. 2152.021(F). They contend that the Juvenile Court must sua sponte consider such diversionary placement ***in all cases*** involving a possible victim of sex trafficking, regardless whether the accused attempted to invoke R.C. 2152.021(F) and regardless whether the accused is alleged to have committed serious violent offenses. But, the language of R.C. 2152.021(F) is not nearly as broad as Appellant and her amici suggest, and it does not lend itself to such an absurd result.

Rather, under well-settled principles of Ohio law regarding the waiver of arguments and the jurisdiction of the Juvenile Court, the Juvenile Court only needs to follow the procedures outlined in R.C. 2152.021(F) when an accused offender invokes the protections of that statute before her case is transferred to the General Division. Appellant did not avail herself of R.C. 2152.021(F)'s protections in this matter. Indeed, she never even mentioned R.C. 2152.021(F) during the Juvenile Court proceedings. As a result, Appellant has waived any argument regarding the potential applicability of R.C. 2152.021(F) in this matter and the Juvenile Court properly transferred this matter to the General Division pursuant to R.C. 2152.12 (which Appellant does not dispute). Although Appellant has preserved a plain error argument regarding this issue, she has not

presented such an argument to either the Ninth District Court of Appeals or to this Court. In light of these significant procedural defects, this Court should decline to fashion an argument on Appellant's behalf and then address it.

If this Court were to look past Appellant's procedural default, then this Court should still conclude that there was no error in the Juvenile Court's decision to transfer this matter to the General Division. R.C. 2152.021(F) does not contemplate providing diversionary placement for individuals accused of serious violent crimes like murder and attempted murder that are unrelated to their involuntary servitude or sexually-oriented activities for hire. Instead, the plain language of R.C. 2152.021(F) indicates that its protections are only available to an offender charged with solicitation- and prostitution-related offenses or other offenses that occurred due to the coercive activity of the offender's trafficker. Here, Appellant was not charged with solicitation- or prostitution-related offenses. Nor is it possible that Kerney or Samuel coerced Appellant into plotting to rob them, which led to both of them being shot in the head. Consequently, Appellant would not have been entitled to the protections of R.C. 2152.021(F) even if she tried to invoke them.

In short, Appellant's and her amici's arguments for her first proposition of law suffer from fatal procedural and substantive flaws. Accordingly, this Court should reject Appellant's first proposition of law.

A. Appellant Has Waived Any Argument Regarding the Potential Applicability of R.C. 2152.021(F).

1. The Waiver Doctrine

As a threshold matter, this Court should reject Appellant's first proposition of law because she has waived any argument regarding the potential applicability of R.C.

2152.021(F) in this matter. It is a well-settled principle of appellate practice that a litigant's failure to raise an issue in the trial court operates as a waiver of that issue on appeal. *See, e.g., State v. Awan*, 22 Ohio St.3d 120, 122, 489 N.E.2d 277 (1986) (" '[A]n appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.' "), quoting *State v. Childs*, 14 Ohio St.2d 56, 236 N.E.2d 545 (1968), paragraph three of the syllabus.

The waiver doctrine places the appellant and appellee on an equal footing in appellate proceedings and precludes an appellant from using appellate proceedings to get an unfair second bite at the apple. *See State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81, 679 N.E.2d 706 (1997) ("These rules are deeply embedded in a just regard to the fair administration of justice. They are designed to afford the opposing party a meaningful opportunity to respond to issues or errors that may affect or vitiate his or her cause."); *State v. Glaros*, 170 Ohio St. 471, 475, 166 N.E.2d 379 (1960) (allowing an appellant to raise a waived argument on appeal "would enable counsel to obtain for his client more than the one fair trial to which he is entitled"). Further, the doctrine stems from the courts' recognition that the record on appeal is devoid of information, evidence, and judicial findings relating to an unraised argument, which makes it more difficult for the reviewing courts to fully address the issue. *See Sizemore v. Smith*, 6 Ohio St.3d 330, 333 fn. 2, 453 N.E.2d 632 (1983) ("[J]ustice is far better served when it has the benefit of briefing, arguing, and lower court consideration before making a final determination."); *Mark v. Mellott Mfg. Co., Inc.*, 106 Ohio App.3d 571,

589, 666 N.E.2d 631 (4th Dist.1995) ("Litigants must not be permitted to hold their arguments in reserve for appeal, thus evading the trial court process.").

Here, it is undisputed that Appellant failed to mention, let alone invoke, the potential protections of R.C. 2152.021(F) before the Juvenile Court's transfer of this matter to the General Division.[3] (Merit Br. of Appellant, p. 13.) Appellant's failure occurred despite the fact that the Juvenile Court even opened the door to the possibility of raising the issue. As a result, Appellant has waived the potential protections of R.C. 2152.021(F) and cannot assert the applicability of the statute on appeal.

2. Appellant's Waiver Has Resulted in the Development of an Insufficient Record for this Court to Review on Appeal.

This Court should apply the waiver doctrine in this matter because Appellant's failure to raise the issue of R.C. 2152.021(F) resulted in the development of a faulty record and it prevented the State from offering any evidence regarding the issue. Due to Appellant's failure to argue the applicability of R.C. 2152.021(F) in the Juvenile Court, Dr. Webb did not make extensive findings regarding the particular circumstances surrounding the trafficking of Appellant. Indeed, because the issue was not raised, the ***only finding*** in the Amenability Evaluation regarding Appellant's status as a potential sex trafficking victim was Dr. Webb's stray observation that Appellant was possibly "being 'sex trafficked' herself." (Amen. Rpt., p. 12.) Appellant, despite having the opportunity to do so, did not offer further evidence or provide more information on this point. Instead, her attorney simply stated that the circumstances of the matter were "highly suspicious." (Amen. Tr., p. 173.)

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3 It should be noted that Appellant has not challenged the General Division's refusal to remand the matter to the Juvenile Court on the basis of R.C. 2152.021(F). Rather, Appellant concedes that proceedings pursuant to R.C. 2152.021(F) are only authorized in Juvenile Court. (Merit Br. of Appellant, p. 9.)

Consequently, the record in this direct appeal does not contain academic studies regarding sex trafficking and their applicability to Appellant. It does not contain explicit findings from psychologists or other medical professionals regarding the circumstances of the trafficking of Appellant. And, it does not contain explicit findings from psychologists or other medical professionals regarding Appellant's status as a sex trafficking victim and its impact of her involvement in the murder of Kerney and the attempted murder of Samuel.

On appeal to this Court, Appellants and her amici attempt to obscure these glaring deficiencies in the record by making their own conclusory findings. They broadly declare that both Kerney and Samuel were traffickers of Appellant despite the fact that neither the Juvenile Court nor Dr. Webb made such a finding before the transfer of this matter to the General Division.[4] Appellant did not even make such a declaration before the Juvenile Court, and as Appellant's amici curiae, Justice for Children Project, *et al.*, acknowledges, the Juvenile Court never made further findings regarding the identity of Appellant's trafficker. (Br. of Amici Curiae, Justice for Children Project, *et al.*, p. 20.) And, without any finding from any medical professional, Appellant and her amici state, without any support in the record, that Appellant's status as a sex trafficking victim was related to the murder of Kerney and the attempted murder of Samuel.

To further gloss over the lack of findings and evidentiary materials in the record that support their declarations, Appellant and her amici have taken a second bite at the apple and have attempted to submit additional materials to this Court that were never

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[4] During the proceedings before the Ninth District, Appellant conceded that "the full extent of [her] subjugation to 'human trafficking' by Kerney was not presented to, or not available to, the Juvenile Court at the time of the amenability hearing." (Ninth District Court of Appeals Br. of Appellant, p. 10.)

submitted to the Juvenile Court. (*See, e.g.*, Merit Br. of Appellant, p. 1 fn. 2, p. 6 fn. 4; Br. of Amicus Curiae, Human Trafficking Law Clinic of Case Western Reserve University School of Law, p. 5, 7, 8, 10, 12-15; Br. of Amici Curiae, Justice for Children Project, *et al.*, p. 9-15.) Appellant has requested that this Court take judicial notice of these extraneous materials. However, judicial notice of such extraneous materials is improper and this Court should not consider them when deciding this direct appeal. *See, e.g.*, *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 76 ("[To prevail, the defendant] would need to supply proof outside the record, which this court cannot consider on direct appeal."); *State v. Ismail*, 54 Ohio St.2d 402, 377 N.E. 500 (1978), paragraph one of the syllabus ("A reviewing court cannot add matter to the record before it, which was not part of the trial court's proceedings, and then decide the appeal on the basis of the new matters."); *State v. Dowdell*, 9th Dist. Summit No. 25930, 2012-Ohio-1326, ¶ 10 ("Any argument which relies on evidence outside the record on appeal would be more appropriate for post-relief proceedings than a direct appeal."); *In re A.B.*, 191 Ohio App.3d 80, 2010-Ohio-5413, 944 N.E.2d 1202, ¶ 19 (8th Dist.) ("The evidence now cited by [the appellant] was not before the trial court when it rendered its judgment; therefore, we cannot consider it on appeal.").

These circumstances provide a quintessential demonstration of why Ohio appellate courts frequently apply the waiver doctrine. Appellant never made any argument, let alone an adequate one, to the Juvenile Court regarding the potential applicability of R.C. 2152.021(F). Accordingly, the record does not contain evidence, such as academic studies or medical opinions, regarding Appellant's status as a potential sex trafficking victim or its relationship to her involvement in the murder of Kerney and attempted murder of Samuel. Now that Appellant is dissatisfied with the outcome she

received in the General Division after failing to bring R.C. 2152.021(F) to the Juvenile Court's attention, she and her amici are engaging in a variety of post hoc tactics to add to the record and raise new arguments without providing the State with a procedurally appropriate opportunity to respond.

To adopt Appellant's new arguments and rely on the factual findings presented by Appellant and her amici, this Court would have to resort to conjecture based on evidence outside of the record without the benefit of vigorous consideration by the Juvenile Court and adversarial arguments at every stage of these proceedings. Absent such argument and consideration below, this Court cannot engage in effective appellate review in this matter. As such, this Court must apply the waiver doctrine and determine that Appellant has waived any argument regarding the applicability of R.C. 2152.021(F).

B. There Is No Plain Error in the Juvenile Court's Failure to Follow the Procedures Contained in R.C. 2152.021(F).

This Court recently held that a juvenile offender's failure to invoke the protections of R.C. 2151.281(A)(1), which like R.C. 2152.021(F) requires the appointment of a guardian ad litem in certain circumstances, resulted in the waiver of all but plain error. *State v. Morgan*, Slip Op. No. 2017-Ohio-7565, ¶ 31. This Court further found that the plain error standard used in criminal cases applies to juvenile delinquency proceedings, *Id.* at ¶ 48, and that that standard does not "presume" the existence of prejudice to the defendant, *Id.* at ¶ 50. The criminal plain error standard requires that Appellant establish the following:

> First, an error, i.e. a deviation from a legal rule, must occur. Second, the error complained of must be plain, that is, it must be an obvious defect in the trial proceedings. Third, the error must have affected substantial rights. We have interpreted this to mean that the trial court's error must have affected the outcome of the [case].

(Internal citations and quotations omitted.) *Id.* at ¶ 35. Even if Appellant satisfies this high standard, courts are still "admonished * * * to notice plain error with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice." (Internal quotations omitted.) *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 23.

1. Appellant Has Not Made a Plain Error Argument.

Although Appellant has preserved a plain error argument in relation to R.C. 2152.021(F), she has failed to present such an argument to either the Ninth District Court of Appeals or this Court. As a result, there has been no briefing, argument, or lower court consideration on this point. Under similar circumstances, this Court has declined to address the merits of an unraised issue because the Court is not a "self-directed board of legal inquiry and research," and it "is not obligated to search the record or formulate legal arguments on behalf of parties." (Internal quotation omitted.) *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 19. Based on Appellant's failures to raise the issue in the Juvenile Court and to make a plain error argument at any stage of the appellate proceedings in this matter, this Court should again decline to root through the record, formulate an argument on her behalf, and then address it.

2. The Record Does Not Reflect the Existence of Plain Error.

Alternatively, if this Court decides to address the potential existence of plain error, then the State asserts that there is none. As explained further below, the Juvenile Court did not deviate from a legal rule, let alone commit an obvious error, by failing to sua sponte apply R.C. 2152.021(F). The plain language of R.C. 2152.021(F) indicates that its protections are not available to Appellant because she was charged with violent

offenses and there is no evidence in the record showing that those violent offenses were related to her status as sex trafficking victim. (*See infra* Subsection I-D under Law and Argument.)

Moreover, there is absolutely no indication in the record that there would have been a different outcome had the Juvenile Court applied R.C. 2152.021(F) and considered a possible diversionary placement for Appellant. On this point, it is important to note that the Juvenile Court did receive some information regarding Appellant's status as a potential victim of sex trafficking and that that information was discussed at the Amenability Hearing. (Amen. Tr., p. 169-173.) Based on that information, the Juvenile Court made a finding that Appellant "has been a victim of * * * human trafficking in the past," which the Court concluded was a factor in favor of the Juvenile Court retaining jurisdiction. (R. 17, Bindover Order, p. 1.)

But, the Juvenile Court concluded that that finding and the others supporting the retention of jurisdiction were outweighed by the violent nature of the offenses, combined with several other factors, including Appellant's cognitive and physical maturity. (*Id.* at p. 2.) Indeed, the Juvenile Court concluded that "public safety requires that [Appellant] be subject to ***adult sanctions***." (Emphasis added.) (*Id.*) This finding was on all fours with Dr. Webb's conclusion that Appellant could only be rehabilitated through "a structured setting, ***mainly prison***." (Emphasis added.) (Amen. Tr., p. 31.) In light of Dr. Webb's conclusion and the Juvenile Court's explicit finding that Appellant should be subject to adult sanctions, it is disingenuous to suggest that the Juvenile Court would have placed Appellant in a diversion program pursuant to R.C. 2151.021(F) had that issue been raised. Instead, the Juvenile Court's findings and the evidence presented regarding amenability plainly show that such diversionary placement would

not have been ordered had the Juvenile Court followed the procedures contained in R.C. 2151.021(F). As such, Appellant cannot establish that any prejudice resulted from the Juvenile Court's failure to sua sponte consider R.C. 2151.021(F).

In short, this is not one of the "rare cases" in which an appellate court must recognize plain error to prevent a manifest miscarriage of justice. *State v. Campbell*, 69 Ohio St.3d 38, 41, 630 N.E.2d 339 (1994). Consequently, this Court should conclude that the Juvenile Court did not plainly err by failing to sua sponte consider R.C. 2152.021(F) before transferring this matter to the General Division.

C. The Juvenile Court's Failure to Follow the Provisions of R.C. 2152.021(F) Did Not Render the Bindover Order Void.

Having conceded that Appellant did not raise the issue of R.C. 2151.021(F) in the Juvenile Court and having failed to argue the existence of plain error, Appellant resorts to a last-ditch argument. She contends that her waiver of the issue is immaterial because the Juvenile Court's failure to sua sponte apply R.C. 2152.021(F) resulted in an unwaivable defect that rendered the Bindover Order void and invalidated the General Division's jurisdiction. There is no support in the language of R.C. 2152.021(F) for such a position. Rather, the language of R.C. 2152.021(F) indicates that the statute is entirely irrelevant to juvenile court's bindover procedures and the general division's jurisdiction. Accordingly, the Juvenile Court's failure to follow the procedures outlined in R.C. 2152.021(F) did not render the Bindover Order void.

1. R.C. 2152.021(F) Does Not Impact Bindover Proceedings or the Jurisdiction of the General Division.

R.C. 2152.021(F) provides, in whole, as follows:

> (1) At any time after the filing of a complaint alleging that a child is a delinquent child and before adjudication, the court may hold a hearing to determine whether to hold the complaint in abeyance pending the child's

successful completion of actions that constitute a method to divert the child from the juvenile court system if the child agrees to the hearing and either of the following applies:

(a) The act charged would be a violation of R.C. 2907.24, 2907.241, or 2907.25 of the Revised Code if the child were an adult.

(b) The court has reason to believe that the child is a victim of a violation of section 2905.32 of the Revised Code, regardless of whether any person has been convicted of a violation of that section or of any other section for victimizing the child, and the act charged is related to the child's victimization.

(2) The prosecuting attorney has the right to participate in any hearing held under division (F)(1) of this section, to object to holding the complaint that is the subject of the hearing in abeyance, and to make recommendations related to diversion actions. No statement made by a child at a hearing held under division (F)(1) of this section is admissible in any subsequent proceeding against the child.

(3) If either division (F)(1)(a) or (b) of this section applies, the court shall promptly appoint a guardian ad litem for the child. The court shall not appoint the child's attorney as guardian ad litem. If the court decides to hold the complaint in abeyance, the guardian ad litem shall make recommendations that are in the best interest of the child to the court.

(4) If after a hearing the court decides to hold the complaint in abeyance, the court may make any orders regarding placement, services, supervision, diversion actions, and conditions of abeyance, including, but not limited to, engagement in trauma-based behavioral health services or education activities, that the court considers appropriate and in the best interest of the child. The court may hold the complaint in abeyance for up to ninety days while the child engages in diversion actions. If the child violates the conditions of abeyance or does not complete the diversion actions to the court's satisfaction within ninety days, the court may extend the period of abeyance for not more than two additional ninety-day periods.

(5) If the court holds the complaint in abeyance and the child complies with the conditions of abeyance and completes the diversion actions to the court's satisfaction, the court shall dismiss the complaint and order the records pertaining to the case be expunged immediately. If the child fails to complete the diversion actions to the court's satisfaction, the court shall proceed upon the complaint.

R.C. 2152.021(F). It is well-established that if the language of a statute is clear and unambiguous, then a court must abstain from applying additional rules of statutory construction. *Burrows v. Indus. Comm.*, 78 Ohio St.3d 78, 81, 676 N.E.2d 519 (1997). Further, "[c]ourts must abstain from inserting words into a statute that were not placed there by the General Assembly." *Coleman v. Portage Cty. Engineer*, 133 Ohio St.3d 28, 2012-Ohio-3881, 975 N.E.2d 952, ¶ 23. This focus on the statutory language, as opposed to considerations of extraneous materials or policy concerns, ensures fidelity to the principle of judicial restraint. *See State ex rel. Carna v. Teays Valley Local School Dist. Bd. of Edn.*, 131 Ohio St.3d 478, 2012-Ohio-1484, 967 N.E.2d 193, ¶ 24 ("We have previously cautioned against 'judicial legislation[.]' "); *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 872, ¶ 23 (" '[W]hether an act is wise or unwise is a question for the General Assembly and not this court.' Therefore, we decline to change the plain meaning of the statute in the name of public policy."), quoting *Bernardini v. Conneaut Area City School Dist. Bd. of Edn.*, 58 Ohio St.2d 1, 4, 387 N.E.2d 1222 (1979).

A review of the statutory language reveals that R.C. 2152.021(F) has absolutely no bearing on a juvenile court's relinquishment of jurisdiction to the general division of the Court of Common Pleas. The statute does not contain any language referring to the transfer of jurisdiction or to the effect of proceedings under R.C. 2152.021(F) upon the bindover process. It also lacks any language that explicitly, or even impliedly, refers to the jurisdiction of juvenile court or the general division. As a result, the plain language of R.C. 2152.021(F) shows that the General Assembly did not intend for the statute to have any jurisdictional significance in either the Juvenile Court or the General Division. The only way to determine that R.C. 2152.021(F) implicates the jurisdiction of either a

juvenile court or a general division is to insert words and phrases that produce such a result. But, this Court cannot engage in such statutory revision. *See State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 15 ("[A] court may not add words to an unambiguous statute, but must apply the statute as written.").

2. R.C. 2152.021(F) is Directory and Does Not Create a Jurisdictional Barrier.

After failing to address the lack of support in the statutory language for her position, Appellant offers the conclusory argument that R.C. 2152.021(F) includes procedural provisions that are jurisdictional in nature. But, this Court recently noted that it "is not wont to construe procedural provisions as jurisdictional barriers unless they are ***clearly statutorily * * * mandated***." (Emphasis added.) *In re Z.R.*, 144 Ohio St.3d 380, 2015-Ohio-3306, 44 N.E.3d 239, ¶ 17, quoting *Nucorp, Inc. v. Montgomery Cty. Bd. of Revision*, 64 Ohio St.2d 20, 22, 412 N.E.2d 947 (1980). The language of R.C. 2152.021(F) does not reflect such a clear statutory mandate. Instead, it indicates that the provisions of R.C. 2152.021(F) are directory rather than mandatory, which means that the statute cannot be construed as a jurisdictional barrier. *See Id.* ("[I]f a procedural provision is more reasonably construed as directory rather than mandatory, a failure to comply with the provision will not preclude a court's jurisdiction over the case."), citing *In re Davis*, 84 Ohio St.3d 520, 523, 705 N.E.2d 1219 (1999). The fact that R.C. 2152.021(F)(1) only states that a juvenile court "may" hold a hearing on the issue further reflects the fact that the provisions of R.C. 2152.021(F) are directory, not mandatory. *See Id.* at ¶ 22, 24-26 (concluding that R.C. 2151.27's venue provisions are directory in part because the statute's language refers to the discretion of the juvenile court); *Korn v. Ohio State Med. Bd.*, 61 Ohio App.3d 677, 683, 573 N.E.2d 1000

(10th Dist.1988) (determining that statutory time limit was directory because statute also gave board discretion regarding scheduling of hearing).[5]

Appellant's only basis for arguing that R.C. 2152.021(F) affected the jurisdiction of the General Division is that R.C. 2152.021(F)(3) states that the court "shall promptly appoint a guardian ad litem for the child."[6] Pursuant to her view, the Juvenile Court's failure to appoint a guardian ad litem rendered the Bindover Order void and removed the jurisdiction of the General Division. Appellant cites to absolutely no on-point authority that supports such a drastic position. As stated above, R.C. 2152.021(F) has no language indicating that it affects the bindover procedure contained in R.C. 2152.12. And, the one case cited by Appellant, *Johnson v. Timmerman-Cooper*, 93 Ohio St.3d 614, 757 N.E.2d 1153 (2001), is completely distinguishable from this matter because *Johnson* involved a defect in the probable cause determination made by the juvenile court under R.C. 2152.12. Additionally, Appellant has presented no argument on appeal that the Juvenile Court violated R.C. 2152.12 when transferring this matter to the General Division, which renders *Johnson* and its progeny immaterial here. *See also In re M.P.*, 124 Ohio St.3d 4445, 2010-Ohio-599, 923 N.E.2d 584, ¶ 11 (noting that a

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5 Even if this Court were to conclude that the provisions of R.C. 2152.021(F) are mandatory and affected the General Division's jurisdiction over the case, then this result would still be of cold comfort to Appellant because she failed to raise the issue in the Juvenile Court. A party waives any issues relating to this "third category of jurisdiction" by failing to raise the issue. *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 12.

6 Appellant conveniently leaves out that a guardian ad litem's role under R.C. 2152.021(F) is only implicated if the juvenile court decides to hold the delinquency complaint in abeyance. *See* R.C. 2152.021(F)(3) ("***If the court decides to hold the complaint in abeyance***, the guardian ad litem shall make recommendations that are in the best interest of the child to the court.") (Emphasis added.) As argued above, there is absolutely no indication in the record that the Juvenile Court would have ordered such diversionary placement in this matter, which means that the role of a guardian ad litem would have never been implicated.

juvenile court can only transfer a delinquency matter under the provisions of R.C. 2152.12).

Moreover, in *Morgan*, 2017-Ohio-7565, this Court addressed the failure of a juvenile court to appoint a guardian ad litem under R.C. 2151.281(A) before transferring the case to the general division. R.C. 2151.281(A), like R.C. 2152.021(F)(3), states that the court "shall" appoint a guardian ad litem in certain circumstances. It is noteworthy that in affirming the defendant's convictions, this Court never addressed any jurisdictional infirmity in the general division's exercise of jurisdiction after the case was transferred. If such an infirmity existed, as Appellant suggests, then the Court had an obligation to sua sponte raise it. *E.g., Diley Ridge Med. Ctr. V. Fairfield Cty. Bd. of Revision*, 141 Ohio St.3d 149, 2014-Ohio-5030, 22 N.E.3d 1072, ¶ 19 ("[J]urisdictional issues not flagged by the parties may, and sometimes must, be raised by the reviewing tribunal sua sponte."). Consequently, *Morgan* strongly suggests that the failure of a juvenile court to appoint a guardian ad litem does not affect the general division's jurisdiction after a bindover. This Court should follow the guidance of *Morgan* here and conclude that R.C. 2152.021(F) did not impact the General Division's jurisdiction.

In sum, R.C. 2152.021(F) does not create a procedural requirement that is a jurisdictional barrier. The Juvenile Court's failure to sua sponte apply R.C. 2152.021(F) did not void the bindover proceedings to the General Division and it had no impact on the General Division's jurisdiction. Consequently, this Court should reject Appellant's last-ditch argument that R.C. 2152.021(F) provides unwaivable protections that invalidated the General Division's jurisdiction.

D. R.C. 2152.021(F) Does Not Apply in this Matter.

If this Court were to reach the merits of Appellant's first proposition of law, then it should still determine that there was no error in the Juvenile Court's failure to apply R.C. 2152.021(F) in this matter. The language of the statute indicates that it does not apply to Appellant because she faced a variety of violent charges, including murder, attempted murder, robbery, and felonious assault that were unrelated to her status as a sex trafficking victim. Moreover, R.C. 2152.021(F) cannot possibly apply in this matter because there is no evidence in the record or finding by the Juvenile Court that Appellant's status was related to her violent offenses.

1. R.C. 2152.021(F) Does Not Apply Where the Juvenile Offender Was Charged with Violent Offenses that Are Unrelated to the Offender's Involuntary Servitude, Sexual Activity for Hire, or other Sexually-Oriented Activities for Hire.

A juvenile court's duty to consider diversion under R.C. 2152.021(F) is only invoked if either R.C. 2152.021(F)(1)(a) or (b) applies. It is undisputed that subsection (F)(1)(a) is inapplicable because Appellant was not charged with prostitution- or solicitation-related offenses under R.C. 2907.24, 2907.241, or 2907.25. Appellant, however, does argue that R.C. 2151.021(F)(1)(b) applies in this matter. In doing so, Appellant and her amici argue that R.C. 2152.021(F)(1)(b) has limitless application in every juvenile proceeding that involves an offender who is found to be the victim of human trafficking. But, a review of subsection of (F)(1)(b) in conjunction with R.C. 2905.32 indicates that its protections are not nearly so extensive as to cover Appellant.

R.C. 2151.021(F)(1)(b) provides that a juvenile court may place a juvenile offender in diversion if "[t]he court has reason to believe that the child is a victim of [R.C.] 2905.32 * * * ***and*** the act charged is related to the child's victimization."

(Emphasis added.) The State concedes that the Juvenile Court had reason to believe that Appellant was a victim of R.C. 2905.32 and indeed made such a finding in the Bindover Order. But, Appellant cannot satisfy R.C. 2151.021(F)(1)(b)'s second requirement that her charged offenses be related to the child's victimization. To resolve this issue, the Court must look to R.C. 2905.32, which proscribes trafficking in persons for the purpose of subjecting the victims to involuntary servitude, sexual activities for hire, or other sexually- or nudity-oriented activities for hire. The essential characteristic of R.C. 2905.32 is that it criminalizes the activities of individuals who compel persons into some form of involuntary servitude or sexual enterprise for hire, which involve the victims being forced to commit non-violent offenses.

Unfortunately, there is no case law in Ohio interpreting R.C. 2151.021(F), and as noted by Appellant and her amici, these types of laws only recently came to the attention of state legislatures, including the General Assembly. But, when this Court construes R.C. 2151.021(F), it should view R.C. 2151.021(F)(1)(a)'s reference to prostitution- and solicitation-related offenses as well as R.C. 2151.021(F)(1)(b)'s cross-reference to R.C. 2905.32 as significant. The consequence of those references is that R.C. 2151.021(F) only applies when a juvenile offender is facing a non-violent charge that either is solicitation- or prostitution-related or results from a human trafficker's compulsion. *See State v. Droste*, 83 Ohio St.3d 36, 39, 697 N.E.2d 620 (1998) ("[T]he expression of one or more items of a class implies that those not identified are to be excluded."). If a violent offense is not prostitution-related or the result of the juvenile offender's involuntary servitude or sexual activity at the compulsion of a human trafficker, then neither R.C. 2151.021(F)(1)(a) nor R.C. 2151.021(F)(1)(b) applies and diversion is unavailable to the juvenile.

Precluding juvenile offenders from diversionary placement under R.C. 2151.021(F) when they are charged with violent crimes would advance the public policy reasons behind the statute's adoption. The purpose of safe harbor laws is to protect minor victims of sex trafficking who are compelled into certain non-violent crimes, like prostitution and solicitation, due to the compulsion of the offender. *See* Polaris Project, *Human Trafficking Issue Brief: Safe Harbor* (Fall 2015), available at https://polarisproject.org/sites/default/files/2015%20Safe%20Harbor%20Issue%20Brief.pdf (accessed Oct. 25, 2017) (hereinafter, *Polaris Issue Brief*) ("A trafficked child may be compelled to engage in illegal activities such as prostitution or the selling of drugs, and instead of being treated as victims, many are treated as criminals and are prosecuted accordingly."). This is because "youth engaged in acts of prostitution are the objects of acute harm, both from a psychosocial as well as a public health perspective[.]" Birckhead, *The "Youngest Profession": Consent, Autonomy, and Prostituted Children*, 88 Wash.U.L.Rev. 1055, 1086 (2011).

That same dynamic is not in play when a victim of human trafficking engages in a violent crime. "Youth engaged in other types of illegal acts [besides prostitution] are not undergoing the same harm to the self, whether in type or degree, but instead are (in many instances) causing harm to others as a result of physical damage to property or bodily harm to persons." *Id.* Accordingly, "[a]lthough public policy calls for preventing the harm experienced by prostituted children, the same policy imperative does not support decriminalizing other illegal acts for which youth may have diminished culpability, for these acts cause identifiable harm to others." *Id.* at 1086-1087. Due to the lack of this policy imperative, it is appropriate to "continu[e] to categorize (and penalize) youth convicted of other [non-prostitution] crimes as either 'juvenile

delinquents' or 'criminal offenders.' " *Id.* at 1087; *see also* Dysart, *Child, Victim or Prostitute? Justice through Immunity for Prostituted Children*, 21 Duke J. Gender L. & Pol'y. 255, 286 (Spring 2014) ("[W]hile, on balance, public policy calls for treating prostituted children as victims, and legislators can act on that public policy by immunizing prostituted minors from prosecution for prostitution, the same policy arguments are not present with respect to violent crimes.").

This critical difference between violent and non-violent offenses has led states and courts to abstain from offering diversionary placement to juvenile offenders facing violent charges. *See, e.g., People v. Gonzalez*, 32 Misc.3d 831, 835, 927 N.Y.S.2d 567 (N.Y. City Crim.Ct.2011) (refusing to vacate human trafficking victim's conviction for resisting arrest because the offense is "not a prostitution-related offense"). That is why even the "***most protective***" safe harbor laws in the nation have only "adopted immunity for children under the age of eighteen for prostitution, promoting prostitution, or other ***non-violent offenses*** if the offense was committed as a direct result of being a victim of human trafficking." (Emphasis added.) *Polaris Issue Brief*, p. 1. In light of this fact, neither Appellant nor her amici have cited a single appellate case from one of the numerous states with safe harbor laws that allowed for the possibility of a diversionary placement when the juvenile was facing a violent charge. Indeed, the only out-of-state authority was cited by Appellant's amicus curiae, the Human Trafficking Pro Bono Legal Center, and that authority only related to New York courts granting safe harbor protection to human trafficking victims when they faced misdemeanor non-violent charges. *Compare People v. C.C.*, 45 Misc.3d 1218(A), 7 N.Y.S.3d 244 (N.Y. City Crim.Ct.2014) (vacating misdemeanor convictions for possession of a controlled substance, loitering for the purposes of engaging in prostitution, and disorderly

conduct); *People v. L.G.*, 41 Misc.3d 428, 972 N.Y.S.2d 418 (N.Y. City Crim.Ct.2013) (vacating misdemeanor convictions for disorderly conduct and possession of a weapon in the fourth degree); *People v. Doe*, 34 Misc.3d 237, 935 N.Y.S.2d 481 (2011) (vacating misdemeanor convictions for loitering for the purposes of engaging in prostitution); *People v. Samantha R.*, N.Y. City Crim.Ct.No. 2011KN092555, 2011 WL 6303402 (Dec. 16, 2011) (same). *But see Gonzalez* at 835 (refusing to vacate sex trafficking victim's conviction for resisting arrest).

In short, this Court should decline Appellant's and her amici's invitation to be the first appellate court in the United States to determine that a safe harbor law allows diversionary placement for offenders charged with violent offenses like murder, attempted murder, robbery, or felonious assault. Such a result is not contemplated by the plain terms of R.C. 2152.021(F) and it would be inconsistent with both the public policy reasons behind the statute and other states' application of their similar safe harbor provisions. As such, this Court should conclude that R.C. 2152.021(F) is inapplicable in this case because Appellant was charged with violent offenses unrelated to her status as a victim of sex trafficking.

2. R.C. 2152.021(F) Is Inapplicable Here Because There Is No Evidence in the Record Indicting that the Juvenile Offender's Status as Sex Trafficking Victim was Related to Her Violent Offenses.

Finally, even if the Court were to conclude that R.C. 2152.021(F) could theoretically apply to juvenile offenders charged with violent offenses, then it should still determine that the statute does not apply in this case. None of the medical and psychological professionals who evaluated Appellant concluded that her status as a sex trafficking victim was related to her involvement in the murder of Kerney and attempted murder of Samuel. Further, there is no evidence in the record indicating that Kerney

and Samuel compelled Appellant to involve herself in the violent offenses against them as part of their own crimes against her. Based on the dearth of any evidence indicating a relationship between Appellant's status and her violent offenses in this matter, this Court should determine that R.C. 2152.021(F) does not apply here.

The State acknowledges that Appellant has faced an extremely difficult life, which includes instances of sex trafficking. The State also acknowledges the compelling public policy reasons behind the adoption of R.C. 2152.021(F) and its application in appropriate cases. Those appropriate cases are where the offender invokes the statute's protections and where they apply because the charged offense was prostitution-related or the offender's trafficker coerced the offender into committing a non-violent offense.

But, quite simply, this is not such a case under the current contours of R.C. 2152.021(F). Appellant waived the protections of R.C. 2152.021(F) because she never invoked them in the Juvenile Court proceedings and under well-settled principles of appellate practice, she cannot assert those protections on appeal. Additionally, based on the plain language of R.C. 2152.021(F), Appellant's waiver did not affect either the authority of the Juvenile Court to transfer the matter to the General Division or the jurisdiction of the General Division.

Further, Appellant was not charged with a solicitation- or prostitution-related offense. And, neither Kerney nor Samuel coerced Appellant into plotting with three accomplices to rob them, which ultimately led to Kerney's murder and Samuel's gunshot injury to his head. Thus, current Ohio law, as it is reflected in the language of R.C. 2152.021(F), does not offer diversionary opportunities to Appellant for her murder, attempted murder, robbery, and felonious assault charges. While Appellant and her amici may lament that fact, their recourse is not available in this direct appeal but rather

only in the form of a legislative enactment from the General Assembly. *See Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 212 ("It is not this court's role to establish legislative policies or to second-guess the General Assembly's policy choices."); *Austintown Twp. Bd. of Trustees v. Tracy*, 76 Ohio St.3d 353, 356, 667 N.E.2d 1174 (1996) (noting the "well-established principles that it is not the function of a reviewing court to assess the wisdom or policy of a statute"); *State v. Smorgala*, 50 Ohio St.3d 222,223, 553 N.E.2d 672 (1990) ("Judicial policy preferences may not be used to override valid legislative enactments.").

In sum, the State requests that this Court reject Appellant's first proposition of law.

II. Appellant's Proposition of Law II: A Juvenile Does Not Waive Issues Related to a Legally Defective Bindover Proceeding by Pleading Guilty in Common Pleas Court.

Appellant's second position of law contends that her guilty plea in the General Division did not operate as a waiver of her argument that the Juvenile Court erred by transferring the matter without applying R.C. 2152.021(F). Appellant's argument again misses the mark because the Juvenile Court's failure to apply R.C. 2152.021(F) did not affect its bindover proceedings pursuant to R.C. 2152.12. Consequently, Appellant's subsequent guilty plea in the General Division waived any issue relating to R.C. 2152.021(F) before the Juvenile Court's issuance of the Bindover Order.[7]

In support of her position, Appellant cites to a number of appellate decisions in which the court concluded that the defendant's guilty plea in the general division did not waive challenges to the juvenile court's determinations of probable cause and amenability under R.C. 2152.12. Appellant misapprehends the import of these decisions. They do not stand for her broad proposition that a juvenile offender may challenge ***any*** purported defect in the juvenile court after pleading guilty in the general division. Instead, they merely stand for the proposition that a juvenile offender may still challenge the juvenile court's determination of probable cause and amenability after pleading guilty in the general division. A juvenile offender's guilty plea, however, does operate as a waiver of other procedural issues that were unraised in the juvenile court, such as the juvenile court's failure to appoint a guardian ad litem, *see State v. Legg*, 2016-Ohio-801, 83 N.E.3d 424 (4th Dist.), as well as other arguments that do not relate

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[7] The rejection of either of Appellant's propositions of law is dispositive in this matter and renders the remaining proposition of law moot. Accordingly if this Court were to reject Appellant's first proposition of law, then it would not need to address the second proposition of law. *E.g. State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.*, 124 Ohio St.3d 390, 2010-Ohio-169, 922 N.E.2d 945, ¶ 23.

to purported errors in the juvenile court's probable cause or amenability determinations, *see State v. Smith*, 9th Dist. Summit No. 26804, 2015-Ohio-579, ¶ 26 (determining that juvenile offender waived argument that juvenile bindover statutes were unconstitutional by pleading guilty in the general division); *State v. Mays*, 2014-Ohio-3815, 18 N.E.3d 850, ¶ 43 (8th Dist.) (same). *See also State ex rel. D.H. v. Judges of Montgomery Cty. Ct. of Common Pleas, Gen. Div.*, 2d Dist. Montgomery No. 27067, 2016-Ohio-5269, ¶ 19 (concluding that the general division did not "patently and unambiguously lack subject matter jurisdiction because of alleged due process violations" in the juvenile court before bindover); *Stallings v. Mitchell*, 11th Dist. Trumbull No. 97-T-0010, 1997 WL 665978, *3 (Oct. 10, 1997) ("[W]e are cognizant of the general principle that the subject matter jurisdiction of a court cannot be waived by a party. Nevertheless, we hold that there is a distinction between a general waiver of jurisdiction itself and the waiver of a statutory procedure for determining whether jurisdiction should be transferred.").

Appellant has not challenged the Juvenile Court's determinations of probable cause or amenability under R.C. 2152.12. And, as argued above, R.C. 2152.021(F)'s provisions have no jurisdictional significance and they have no impact on the juvenile court's bindover proceedings. Moreover, Appellant has not cited any authority that indicates that a juvenile court's failure to comply with the procedural requirements of R.C. 2152.021(F) or another similar statute renders a juvenile bindover improper. As a result, by pleading guilty in the General Division, Appellant has waived any issue relating to the Juvenile Court's failure to apply R.C. 2152.021(F). *See State v. Kelly*, 57 Ohio St.3d 127, 566 N.E.2d 658 (1991), paragraph two of the syllabus ("A plea of guilty following a trial and prior to sentencing effectively waives all appealable errors which

may have occurred at trial[.]"). Consequently, the State requests that this Court reject Appellant's second proposition of law.

CONCLUSION

Pursuant to the arguments offered, the State respectfully contends that both propositions of law should be rejected and the judgment of the Ninth District Court of Appeals should be affirmed.

Respectfully submitted,

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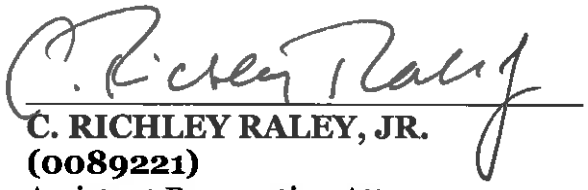

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PROOF OF SERVICE

I hereby certify that on the 1st day of November 2017 a copy of the foregoing Merit Brief was sent by regular U.S. Mail and e-mail to:

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